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No. 593

In the Supreme Court of the United States

OCTOBER TERM, 1939

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES; CHARLES V. McLAUGHLIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES; L. METCALFE WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES; ET AL., PETITIONERS,

v.

LUKENS STEEL COMPANY, A CORPORATION; ALAN WOOD STEEL COMPANY, A CORPORATION; SOUTH CHESTER TUBE COMPANY, A CORPORATION; ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL STATEMENT FOR THE PETITIONERS

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On pages 147–152 of their brief petitioners set forth certain data with respect to the geographic distribution of bidders and sources of supply in 72 steel contracts awarded by various government agencies during the 6 months period immediately

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preceding the date of the minimum wage determination for the iron and steel industry. Typewritten tabulations of the data analysed and discussed in petitioners' brief were filed with the Clerk of this Court and submitted to counsel for respondents. Thereafter, with assistance furnished by counsel for petitioners, counsel for respondents commenced examination of the actual bids on the contracts involved. Counsel for respondents raised numerous objections to the accuracy of the tabulations filed by petitioners and consequently to the accuracy of the maps and the analysis which were based upon these tabulations. The objections to the accuracy of the tabulations upon which the maps and the analysis were based fall into three categories:

"1. Counsel discovered a number of clerical errors in the names and location of bidders and sources of supply. For example, in reporting one bid of the Bethlehem Steel Company, the source of supply was incorrectly stated to be "Johnstown & Lebanon, Pa." instead of "Sparrows Point, Md.". In other instances, the name of one of the several bidders was omitted. The data contained in the tabulations has been rechecked against the original bids, and the revised tabulations, filed with the Clerk and submitted to counsel, reflect corrections of these clerical errors.

2. The second objection raised by counsel for respondents was that the materials called for by some

of the contracts dealt with in the original tabulations did not fall within the definition of products of the iron and steel industry as set forth in the determination of the Acting Secretary, and that therefore it was improper to draw conclusions as to the nature of the competition in the iron and steel industry from the bidding upon contracts for such materials as galvanized steel products. Further, counsel objected to the use of the bidding upon contracts for galvanized products to illustrate the so-called "alternative bid" phenomenon discussed in petitioners' brief, since this may merely indicate that the steel will be manufactured at one point and then shipped to another point where it will be galvanized.

In order to avoid all questions of this character petitioners have eliminated from their tabulations, maps and comment all bids for the manufacture or furnishing of galvanized steel products and machine forged steel flanges and reinforcing steel, cut and bent. The elimination of the bids for these products has reduced the number of contracts dealt with by the revised tabulations from 72 to 56.

3. A third source of some confusion may be traceable to the fact that many of the contracts under discussion embraced two or more "lots," on each of which the number and identity of the bidders may have varied and on each of which there might have been awarded a separate contract. In order to avoid any possible confusion which might

arise out of lumping of all the bidders on a single contract, in cases in which all of the bidders may not have bid upon all of the lots contained in the contract, the revised tabulations and maps have broken down each contract into its component lots. In some cases one or more lots within a single contract may call for products such as galvanized steel, which may not fall within the definition of the iron and steel industry. In such cases the lots containing the questionable products have been completely eliminated from the tabulations and from the maps.

This revision of the tabulations and maps does not affect the conclusions to be drawn from the material as originally submitted. The following should be substituted for the portion of petitioners' brief beginning with the first complete paragraph on p. 147 and extending through the first paragraph on page 150:

It seems unlikely that respondents will dispute the large area of competition found in government steel contracts.[1] But it may be well affirmatively to indicate its extent. The report of the Board summarizes and gives illustrative examples of government steel contracts which demonstrate "that the Government requirements for iron and steel are served by plants located in all parts of the

[1] See "Report of the Federal Trade Commission to the President in response to Executive Order of May 30, 1934, with Respect to the Basing-Point System in the Iron and Steel Industry," U. S. Government Printing Office, November 1934, pp. 14–18 and *passim*.

country" (R. 184, 185–188). An analysis has been made of the competitive bidding on 121 lots, each of which represent a separate case of competitive bidding, contained in 56 steel contracts awarded subject to the Public Contracts Act by the Navy Department, the War Department, the Panama Canal Zone, and the Bureau of Reclamation of the Department of the Interior during the six months' period immediately preceding the date of this determination.[2] This analysis shows that the locality here challenged (hereinafter called the "northeastern locality") is the smallest area within which, in advance of the award of a contract to any of the respondents, it can be determined that the contract will be performed.

Thus, on 43 lots, the competitive bidding on each of which might have resulted in the award of a separate contract, the bidders were distributed in varying degrees throughout the entire country. On the remaining 78 lots all of the bidders were located either in the northeastern locality or in the locality immediately to the west (hereinafter referred to as the "midwestern locality"), in which the prevailing minimum wage is also 62.5 cents per hour.

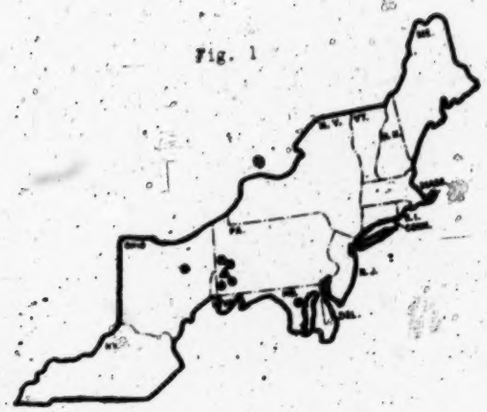
On 31 of the last-mentioned group of 78 lots, all of the bidders were located within the north-

[2] The data is taken from the files of the Public Contracts Division and the Departments involved; a typewritten summary has been filed with the Clerk and submitted to counsel for respondents.

eastern locality. As is shown on the map on the opposite page, depicting the bidding on 31 lots, the competition among bidders located throughout this locality was general on 30 of the 31 lots.[3] The phenomenon of "alternative bidding" indicated on several of the lots depicted brings home the facts that no area less extensive than this smallest discernible area of bidders would be appropriate to the accomplishment of the purposes of the Act. In Figures 7, 9 and 18, on this map, the connection of two or more points by a line indicates that a particular bidder stated in his bid that, if awarded the contract, steel would be supplied from any or all of the connected plants. Thus, even after the award of the contract, the place of performance might be determinable at the option of the lowest bidder. Clearly, the Congressional objective of rewarding rather than penalizing the high minimum wage manufacturer can only be accomplished by the determination of the uniform minimum wage prevailing throughout an area in which it is realistically possible to say that the "materials * * * are to be manufactured" and within which the payment of less than the uniform minimum standard may attract the place of actual performance away from the fair minimum wage standard employer.

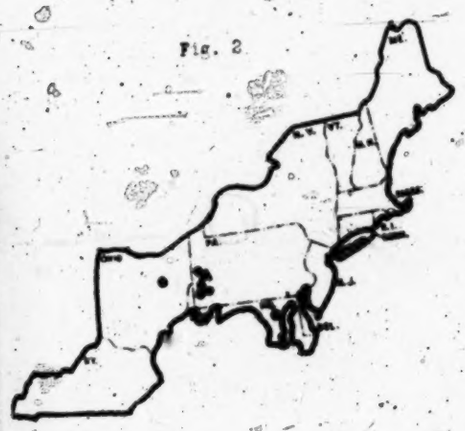
[3] On one of these lots—#189, Navy Contract reg. no. 7272—there was but one bidder and one source of supply.

Fig. 1



Navy Dept., Contract Reg. No. 6092, Lot 582 (Lot 585 2/)
No. of Bidders - 9
No. of Indicated Sources of Supply - 9

Fig. 2



Navy Dept., Contract Reg. No. 6093, Lot 583 (Lot 586 2/)
No. of Bidders - 9
No. of Indicated Sources of Supply - 9

Fig. 3

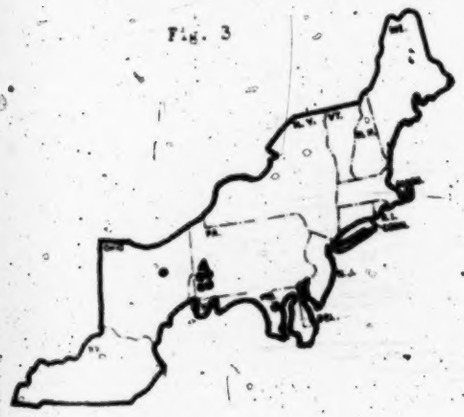
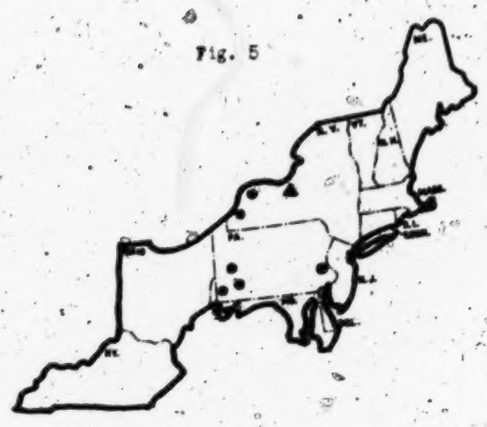
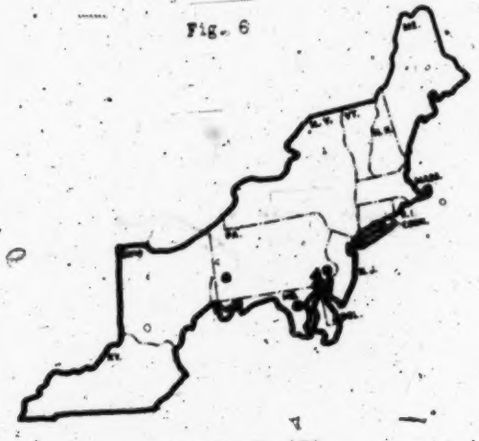


Fig. 5



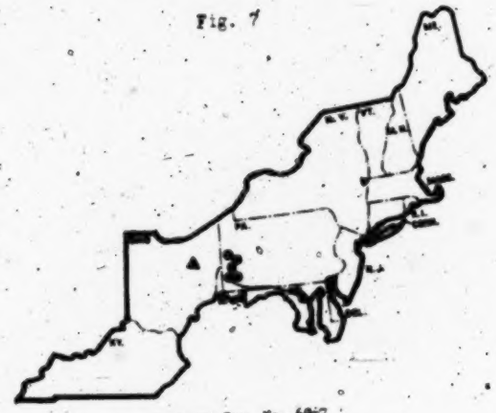
Navy Dept., Contract Reg. No. 6575, Lot 220
(Lots 221 1/ and 224 2/)
No. of Bidders - 8
No. of Indicated Sources of Supply - 8

Fig. 6



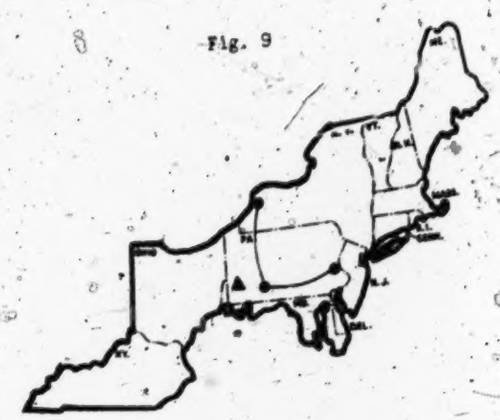
Navy Dept., Contract Reg. No. 6819
No. of Bidders - 6
No. of Indicated Sources of Supply - 6

Fig. 7



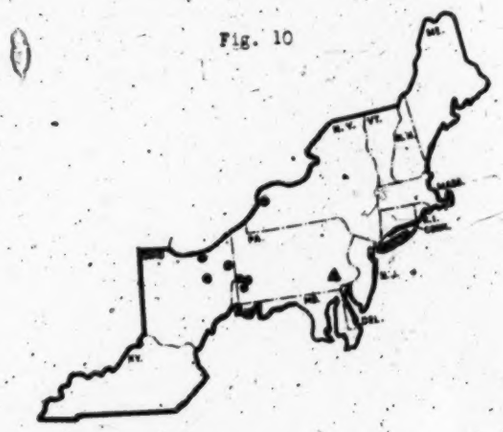
Navy Dept., Contract Reg. No. 6867

Fig. 9



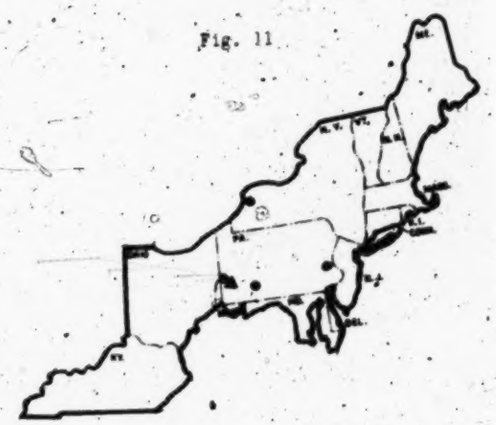
Navy Dept., Contract Reg. No. 7272, Lot 188
(Lot 1962/) (Lot 1972/)
No. of Bidders - 2
No. of Indicated Sources of Supply - 4

Fig. 10



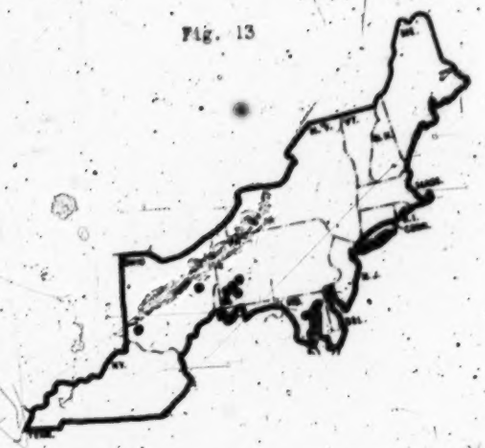
Navy Dept., Contract Reg. No. 7273, Lot 189
No. of Bidders - 13
No. of Indicated Sources of Supply - 8

Fig. 11



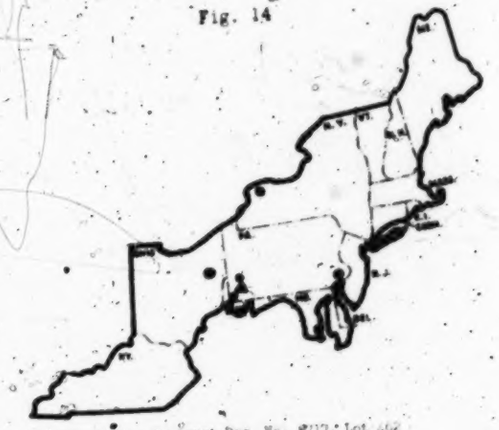
Navy Dept., Contract Reg. No. 7274, Lot 190

Fig. 13



Navy Dept., Contract Reg. No. 8713, Lot 467 (Lot 468 2/)
No. of Bidders - 8
No. of Indicated Sources of Supply - 8

Fig. 14



Navy Dept., Contract Reg. No. 8717, Lot 460
(Lots 461, 463, 464 2/)
No. of Bidders - 6
No. of Indicated Sources of Supply - 6

Fig. 15

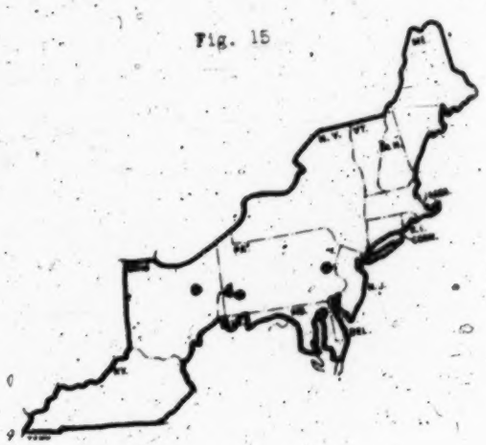
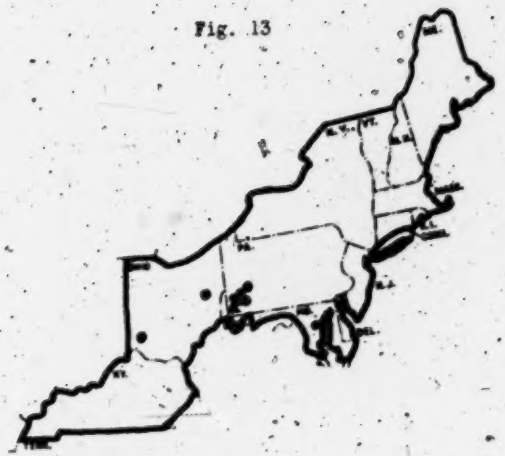
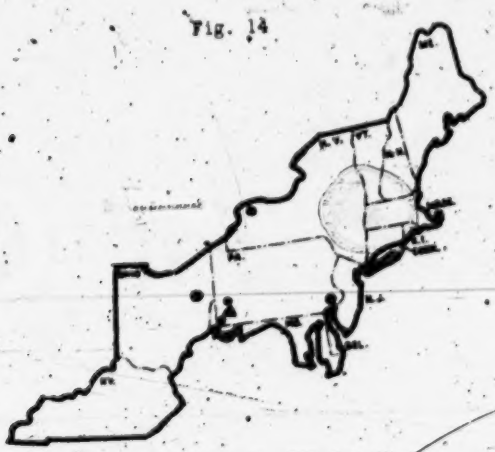


Fig. 13



Navy Dept., Contract Reg. No. 8713, Lot 467 (Lot 468[1])
No. of Bidders - 8
No. of Indicated Sources of Supply - 8

Fig. 14



Navy Dept., Contract Reg. No. 8717, Lot 462
(Lots 461, 463, 464[2])
No. of Bidders - 6
No. of Indicated Sources of Supply - 6

Fig. 15

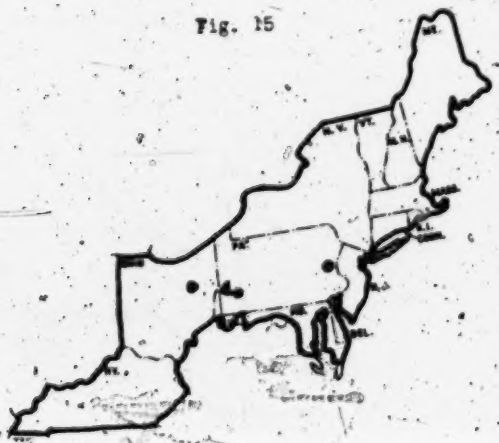
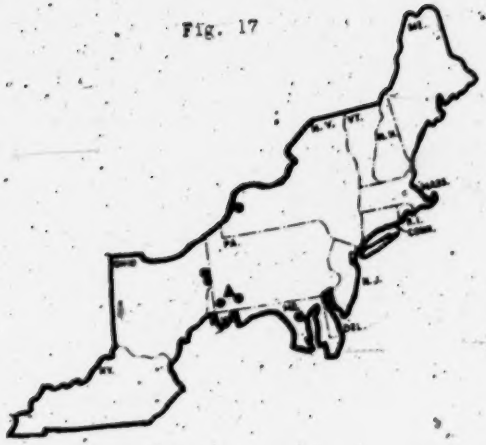
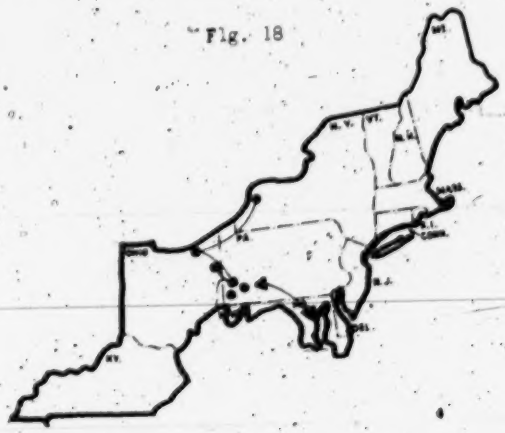


Fig. 17



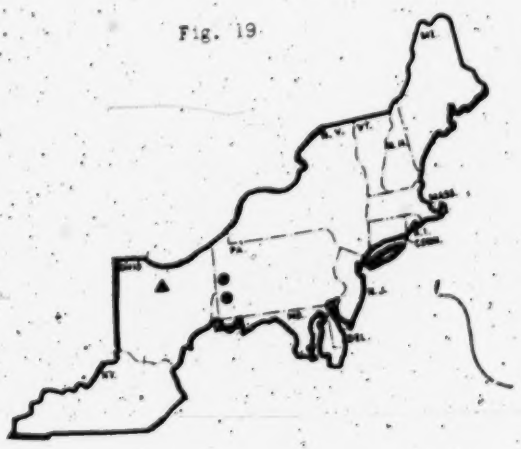
War Dept., Contract Reg. No. 7376
No. of Bidders - 9
No. of Indicated Sources of Supply - 9

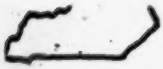
Fig. 18



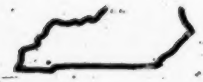
War Dept., Contract Reg. No. 8094
No. of Bidders - 9
No. of Indicated Sources of Supply - 12

Fig. 19



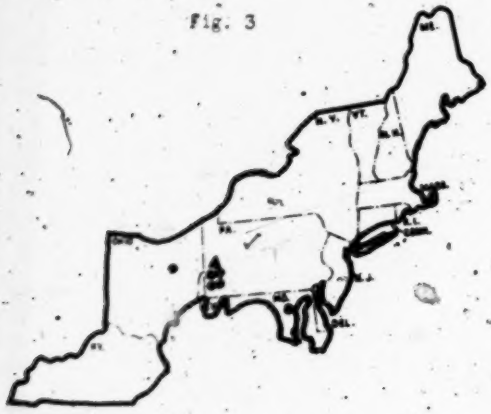


Navy Dept., Contract Reg. No. 6093, Lot 583 (Lot 586[2/])
No. of Bidders - 9
No. of Indicated Sources of Supply - 9



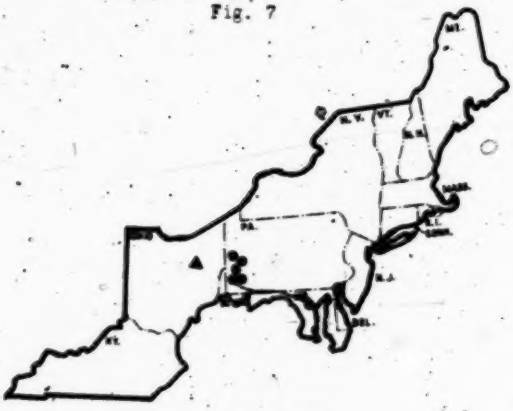
Navy Dept., Contract Reg. No. 6819
No. of Bidders - 6
No. of Indicated Sources of Supply - 6

Fig. 3



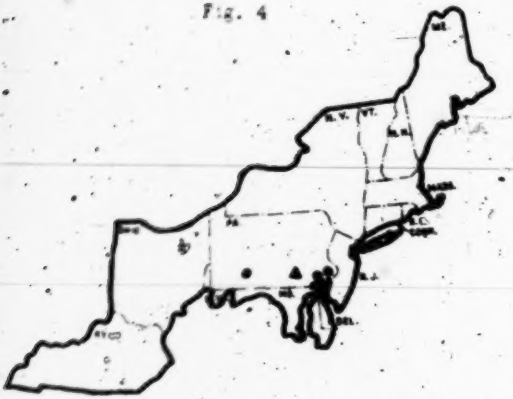
Navy Dept., Contract Reg. No. 6094, Lot 587 (Lot 584[2/])
No. of Bidders - 9
No. of Indicated Sources of Supply - 9

Fig. 7



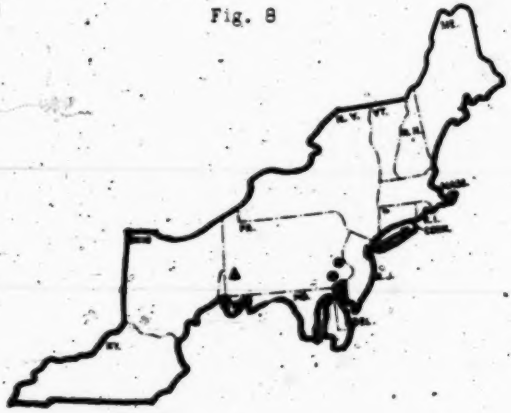
Navy Dept., Contract Reg. No. 6867
No. of Bidders - 7
No. of Indicated Sources of Supply - 7

Fig. 4

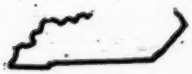


Navy Dept., Contract Reg. No. 6143, Lot 180 (Lot 191[2/])
No. of Bidders - 6
No. of Indicated Sources of Supply - 5

Fig. 8



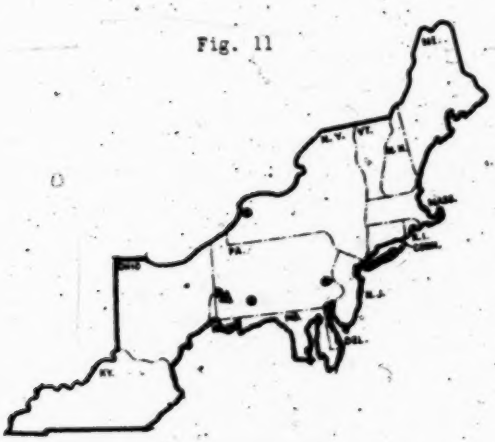
Navy Dept., Contract Reg. No. 7162, Lot 122
No. of Bidders - 4
No. of Indicated Sources of Supply - 4



Navy Dept., Contract Reg. No. 7273, Lot 185
No. of Bidders - 13
No. of Indicated Sources of Supply - 8

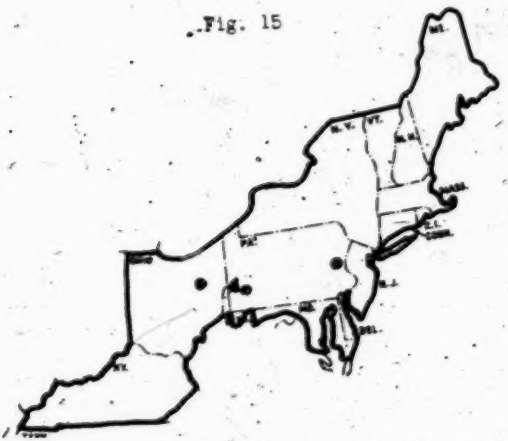
Navy Dept., Contract Reg. No. 8717, Lot 462
(Lots 461, 463, 464?)
No. of Bidders - 6
No. of Indicated Sources of Supply - 6

Fig. 11



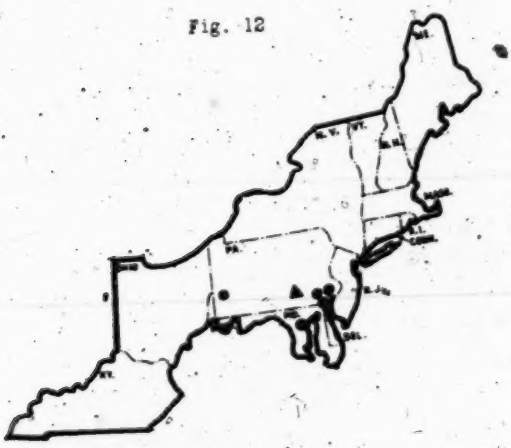
Navy Dept., Contract Reg. No. 7274, Lot 190
No. of Bidders - 5
No. of Indicated Sources of Supply - 7

Fig. 15



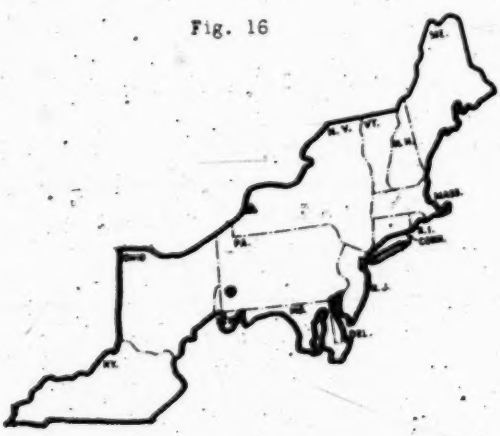
Panama Canal, Contract Reg. No. 6469
No. of Bidders - 4
No. of Indicated Sources of Supply - 4

Fig. 12



Navy Dept., Contract Reg. No. 7452, Lot 144
No. of Bidders - 7
No. of Indicated Sources of Supply - 7

Fig. 16

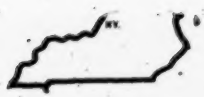


Interior Dept., Contract Reg. No. 7373
No. of Bidders - 2
No. of Indicated Sources of Supply - 2

A L D I S T R I B U T I O N O F S O U R C E S O F S U P P L Y

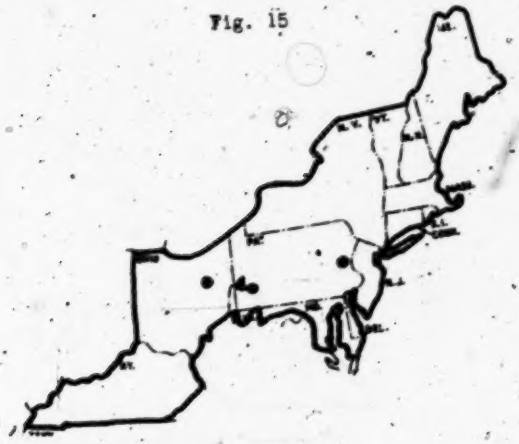
licated by Bidders on 31 Lots in Contracts for Iron and Steel Products
[illegible] 64 Interior Department and the Panama Canal

Navy Dept., Contract Reg. No. 8717, Lot 462
(Lots 461, 463, 464 2/)
No. of Bidders - 6
No. of Indicated Sources of Supply - 6



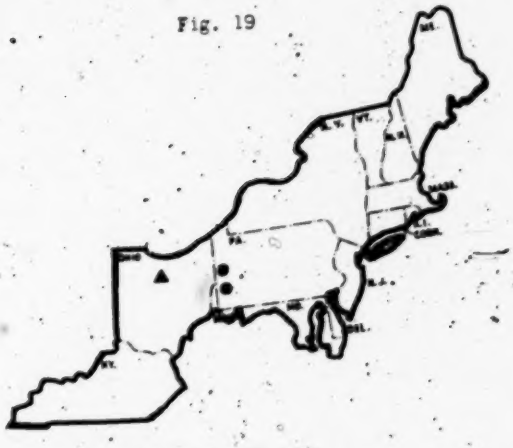
War Dept., Contract Reg. No. 8094
No. of Bidders - 9
No. of Indicated Sources of Supply - 12

Fig. 15



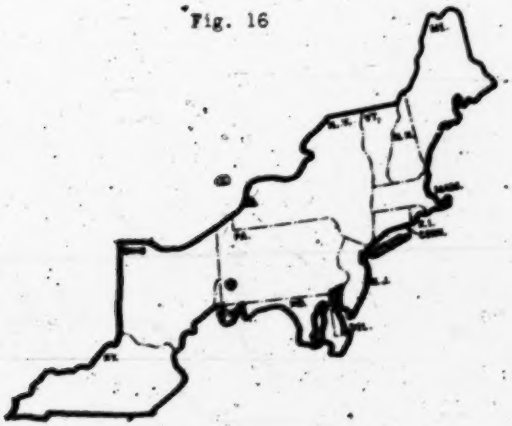
Panama Canal, Contract Reg. No. 6469
No. of Bidders - 4
No. of Indicated Sources of Supply - 4

Fig. 19



War Dept., Contract Reg. No. 9570
No. of Bidders - 3
No. of Indicated Sources of Supply - 3

Fig. 16



Interior Dept., Contract Reg. No. 7373
No. of Bidders - 2
No. of Indicated Sources of Supply - 2

LEGEND

▲ Indicated sources of supply of successful bidders.
● Indicated sources of supply of other bidders.
Interconnecting lines indicate alternative indicated sources of supply.

1/ Bidders identical with those on lot illustrated.

2/ All bids for these lots show points of production similarly distributed within the locality.

3/ One bidder and one source of supply.

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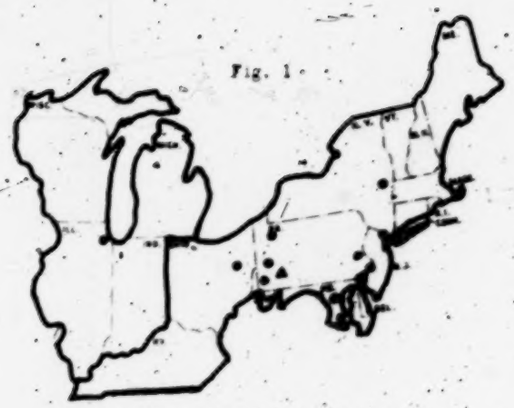
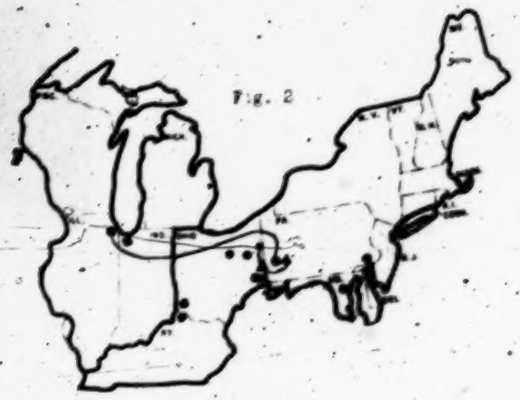
Fig. 1



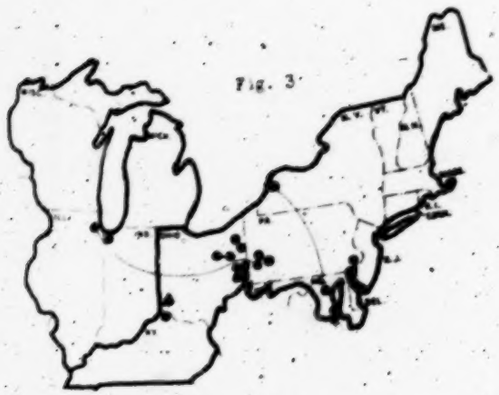
Navy Dept., Contract Reg. No. 6279, Lot 401 (Lot 401 2/)
No. of Bidders - 11
No. of Indicated Sources of Supply - 11

Fig. 2



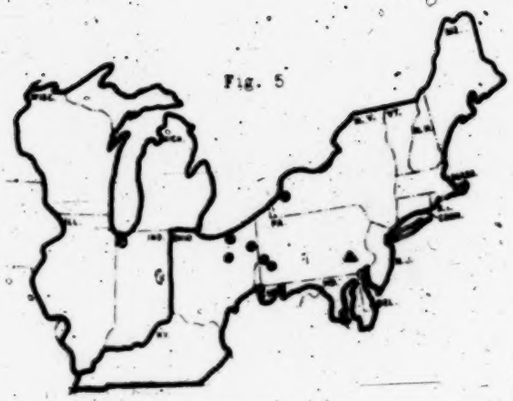
Navy Dept., Contract Reg. No. 6268, Lot 229 (Lot 229 2/)
No. of Bidders - 10
No. of Indicated Sources of Supply - 16

Fig. 3



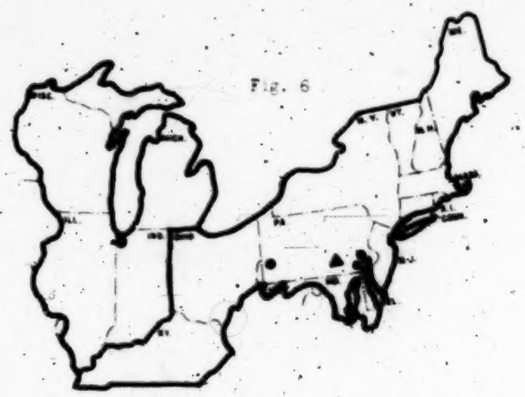
Navy Dept., Contract Reg. No. 6845, Lot 232
No. of Bidders - 15
No. of Indicated Sources of Supply - 18

Fig. 5



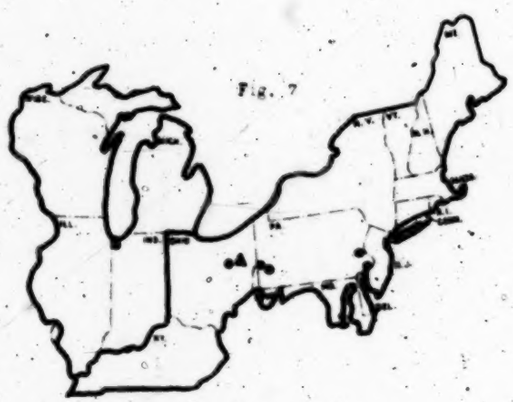
Navy Dept., Contract Reg. No. 7273, Lot 184 (Lot 184 2/)
No. of Bidders - 14
No. of Indicated Sources of Supply - 8

Fig. 6



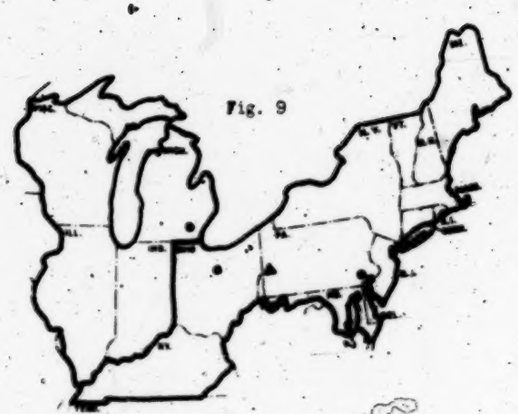
Navy Dept., Contract Reg. No. 7452, Lot 134 (Lot 134 2/)
No. of Bidders - 7
No. of Indicated Sources of Supply - 6

Fig. 7



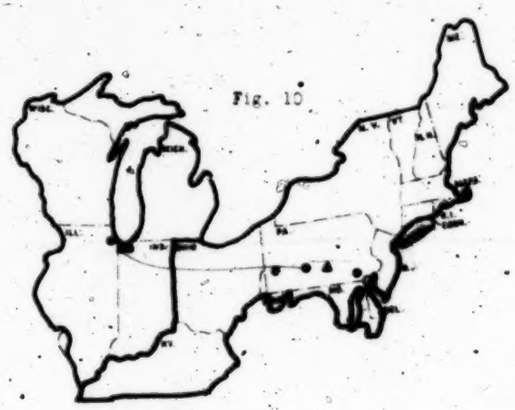
Navy Dept., Contract Reg. No. 7653
No. of Bidders - 8
No. of Indicated Sources of Supply - 7

Fig. 9



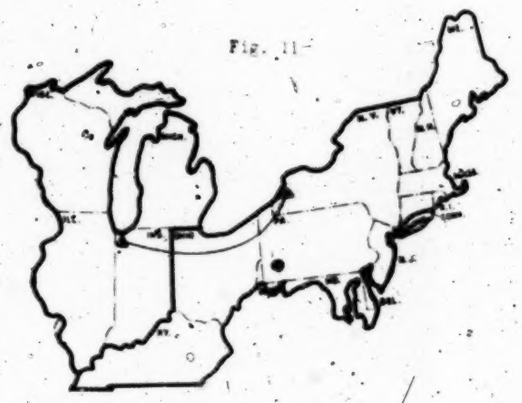
Navy Dept., Contract Reg. No. 6443, Lot 379 (Lots 480, 481 and 482 2/)
No. of Bidders - 7
No. of Indicated Sources of Supply - 5

Fig. 10



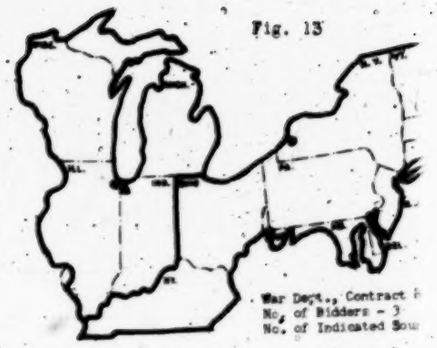
War Dept., Contract Reg. No. 6295
No. of Bidders - 8
No. of Indicated Sources of Supply - 7

Fig. 11



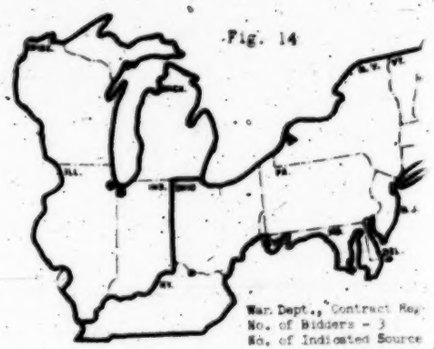
War Dept., Contract Reg. No. 6390
No. of Bidders - 3
No. of Indicated Sources of Supply - 4

Fig. 13



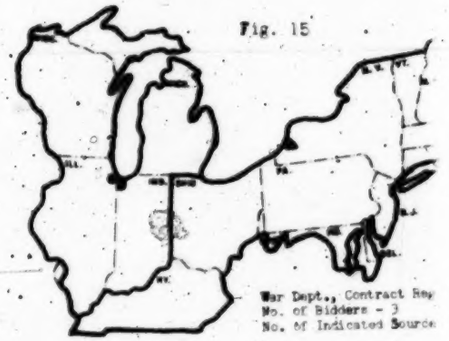
War Dept., Contract R
No. of Bidders - 3
No. of Indicated Sou

Fig. 14



War Dept., Contract Reg
No. of Bidders - 3
No. of Indicated Source

Fig. 15



War Dept., Contract Reg
No. of Bidders - 3
No. of Indicated Source

Fig. 16

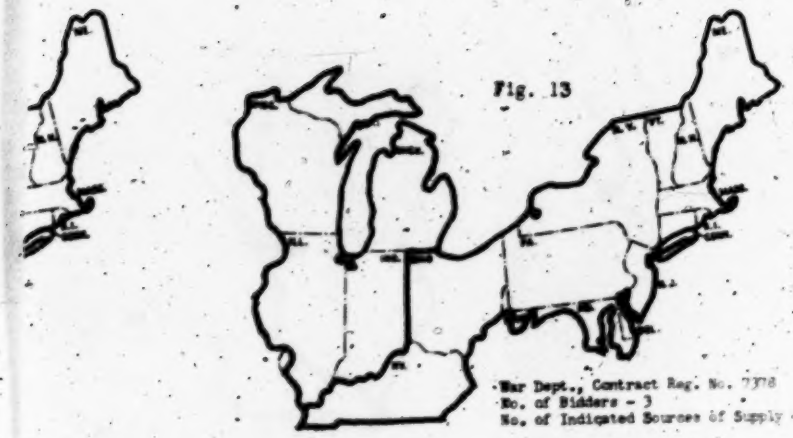


Fig. 13

War Dept., Contract Reg. No. 7378
No. of Bidders - 3
No. of Indicated Sources of Supply - 3

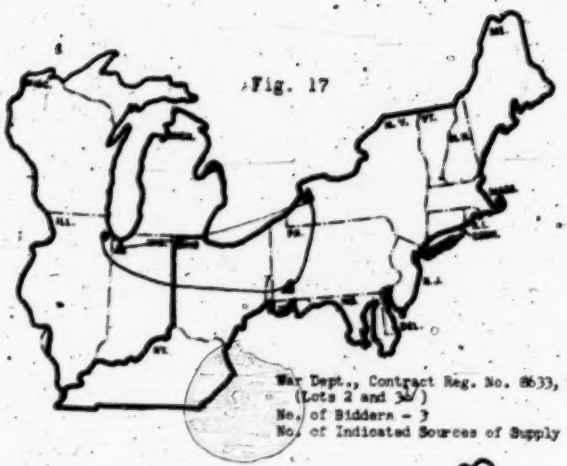


Fig. 17

War Dept., Contract Reg. No. 8633, Lot 1
(Lots 2 and 3 2/)
No. of Bidders - 3
No. of Indicated Sources of Supply - 3

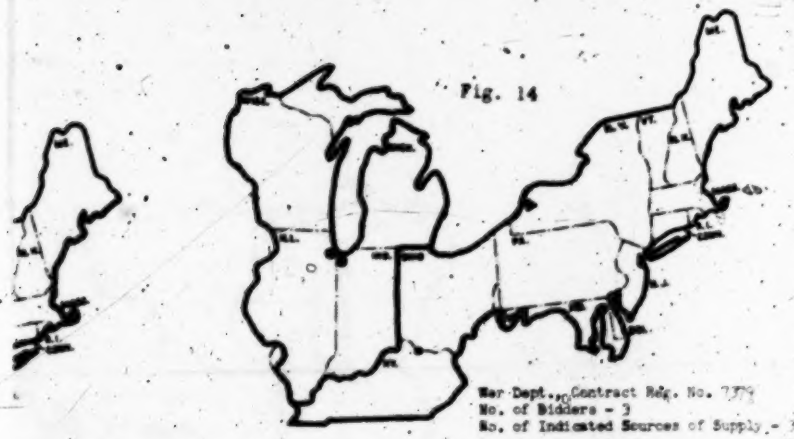


Fig. 14

War Dept., Contract Reg. No. 7379
No. of Bidders - 3
No. of Indicated Sources of Supply - 3

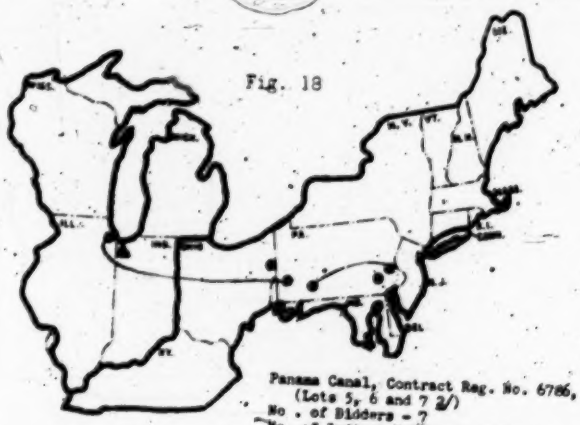


Fig. 18

Panama Canal, Contract Reg. No. 6786, Lot 3
(Lots 5, 6 and 7 2/)
No. of Bidders - 7
No. of Indicated Sources of Supply - 9

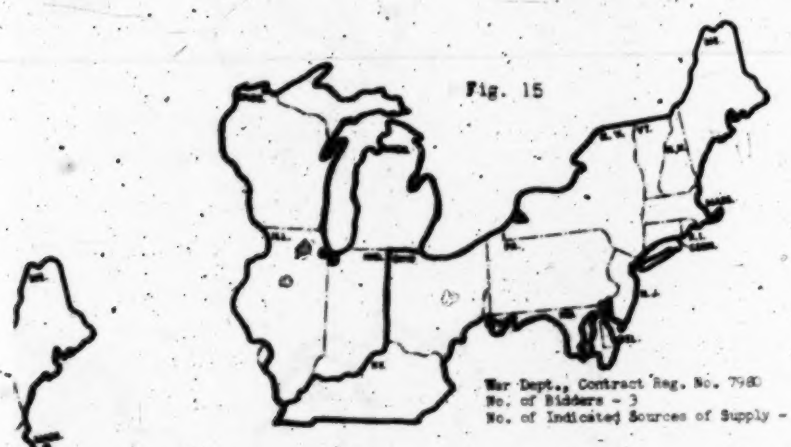


Fig. 15

War Dept., Contract Reg. No. 7980
No. of Bidders - 3
No. of Indicated Sources of Supply - 3

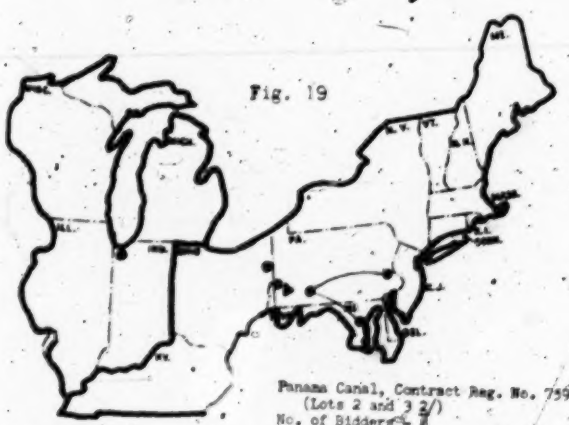


Fig. 19

Panama Canal, Contract Reg. No. 7599, Lot 8
(Lots 2 and 3 2/)
No. of Bidders - 8
No. of Indicated Sources of Supply - 8

Fig. 16

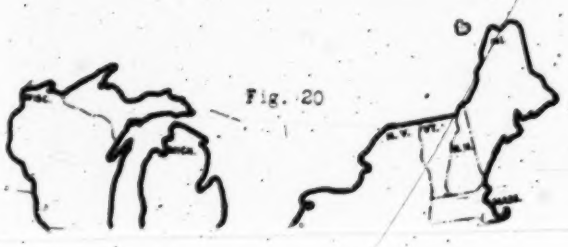
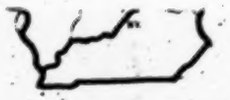


Fig. 20

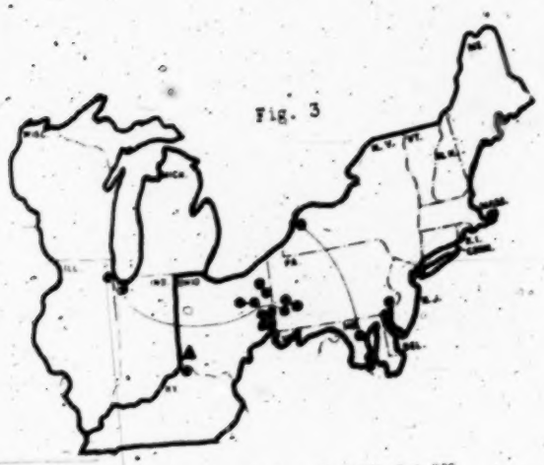
Navy Dept., Contract Reg. No. 6748, Lot 229
(Lot 231 2/)
No. of Bidders - 17
No. of Indicated Sources of Supply - 16



Navy Dept., Contract Reg. No. 7452, Lot 134. (Lot 135 2/)
No. of Bidders - 7
No. of Indicated Sources of Supply - 6

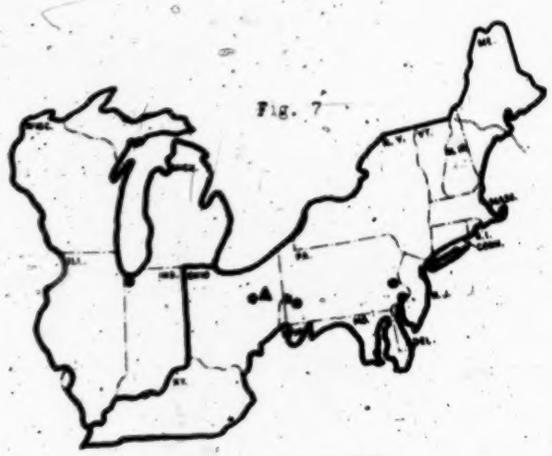
War Dept., Contract Reg. No. 6295
No. of Bidders - 8
No. of Indicated Sources of Supply - 7

Fig. 3



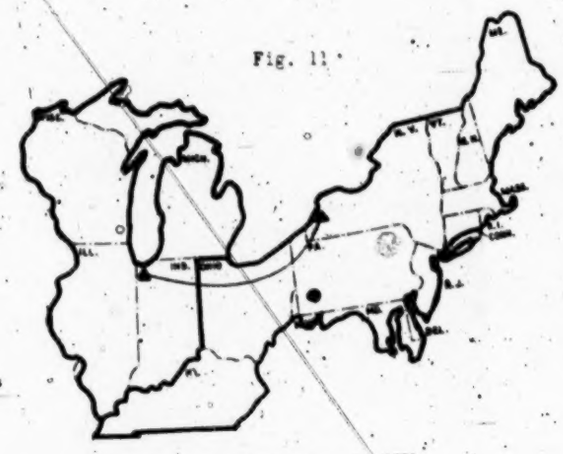
Navy Dept., Contract Reg. No. 6855, Lot 232
No. of Bidders - 15
No. of Indicated Sources of Supply - 13

Fig. 7



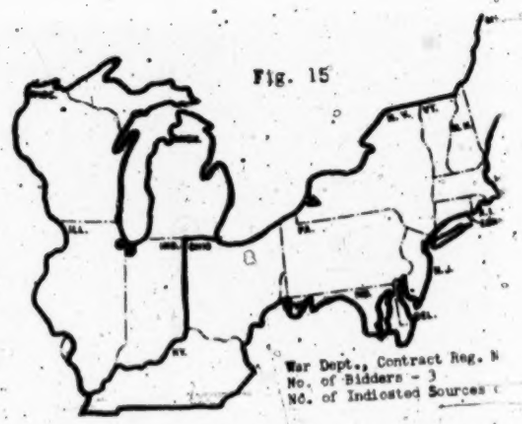
Navy Dept., Contract Reg. No. 7653
No. of Bidders - 8
No. of Indicated Sources of Supply - 7

Fig. 11



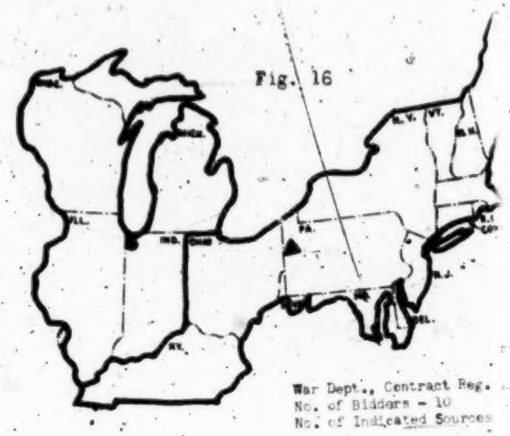
War Dept., Contract Reg. No. 6990
No. of Bidders - 3
No. of Indicated Sources of Supply - 4

Fig. 15



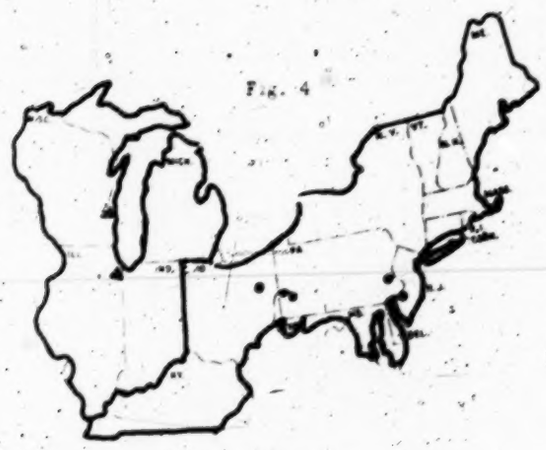
War Dept., Contract Reg. N
No. of Bidders - 3
No. of Indicated Sources

Fig. 16



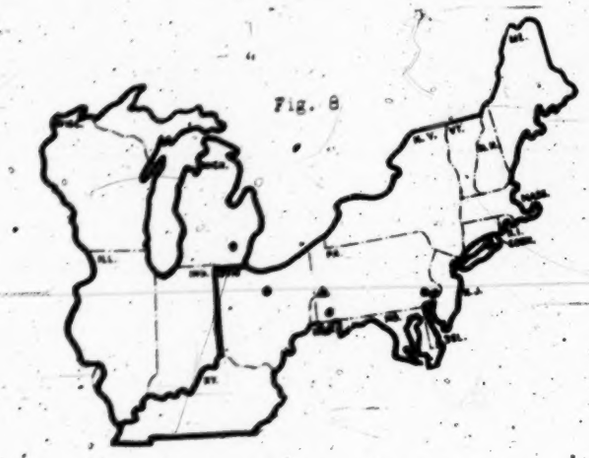
War Dept., Contract Reg.
No. of Bidders - 10
No. of Indicated Sources

Fig. 4



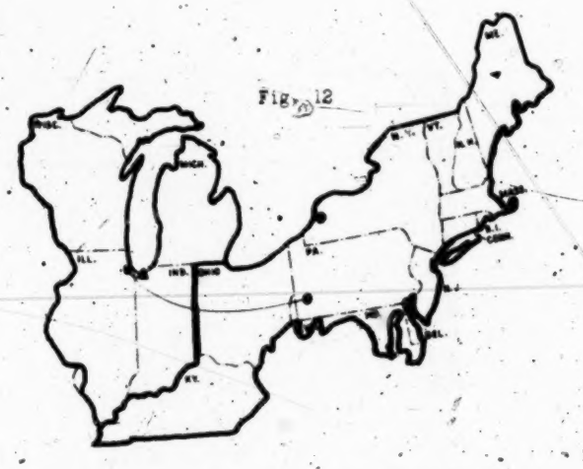
Navy Dept., Contract Reg. No. 7272, Lot 6A
(Lots 174, 175, 176, 177, 178, 179, 181
and 182A) (Lot 173 2/)
No. of Bidders - 5
No. of Indicated Sources of Supply - 5

Fig. 8



Navy Dept., Contract Reg. No. 9442, Lot 882
(Lots 883, 884 and 885 2/)
No. of Bidders - 8
No. of Indicated Sources of Supply - 6

Fig. 12



War Dept., Contract Reg. No. 7241, Lot 1 (Lot 2 2/)
No. of Bidders - 5
No. of Indicated Sources of Supply - 4

GEOGRAPHICAL DISTRIBUTION OF SOURCES OF SUPPLY

Indicated by Bidders on 47 Lots in Contracts for Iron and Steel Products
Awarded by the Navy, War and Interior Departments and the Panama Canal
During the Period from January 1 to June 30, 1938

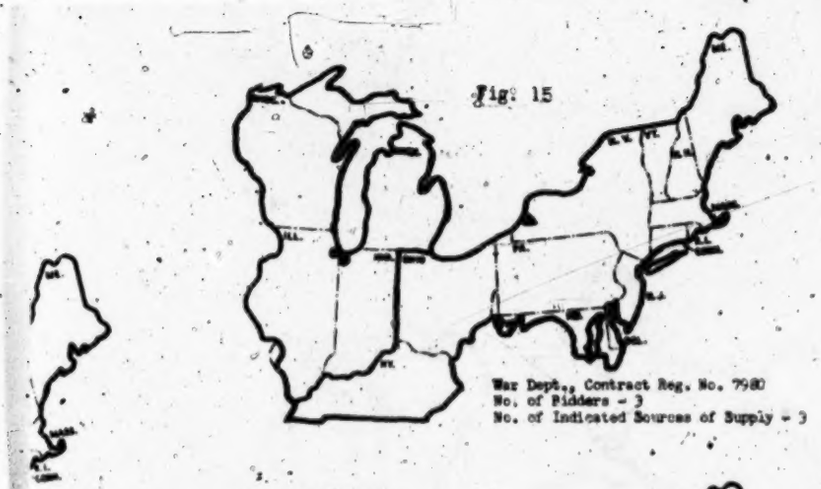


Fig. 15

War Dept., Contract Reg. No. 7980
No. of Bidders - 3
No. of Indicated Sources of Supply - 3

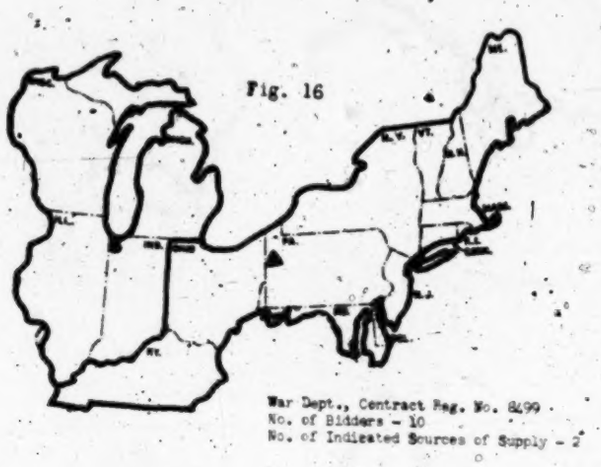


Fig. 16

War Dept., Contract Reg. No. 8499
No. of Bidders - 10
No. of Indicated Sources of Supply - 2

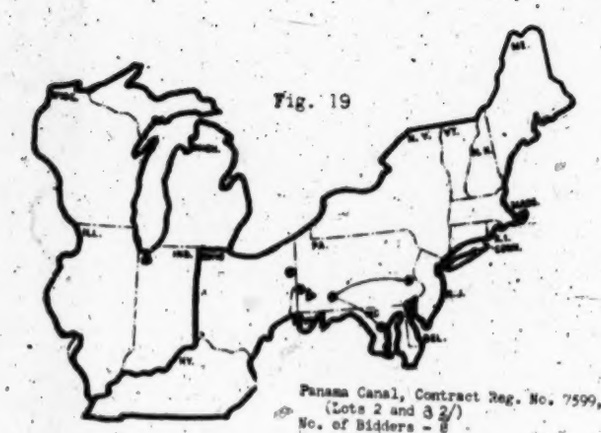


Fig. 19

Panama Canal, Contract Reg. No. 7599, Lot 8
(Lots 2 and 3 2/)
No. of Bidders - 8
No. of Indicated Sources of Supply - 8

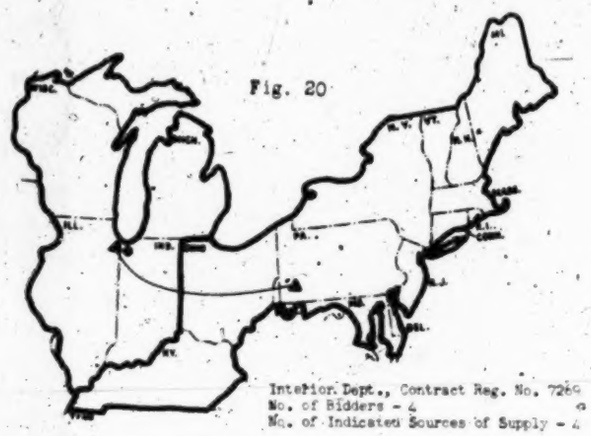


Fig. 20

Interior Dept., Contract Reg. No. 7269
No. of Bidders - 4
No. of Indicated Sources of Supply - 4

LEGEND

▲ Indicated sources of supply of successful bidders.
● Indicated sources of supply of other bidders.
Interconnecting lines indicate alternative indicated sources of supply.

1/ Bidders identical with those on lot illustrated.

2/ All bids for these lots show points of production similarly distributed within these localities.

3/ One bidder and one source of supply.

ES OF SUPPLY

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The map depicting the bidding on 47 lots indicates that on all but one of the 47 lots [1] the bidders were distributed throughout both the northeastern and the midwestern localities. Here, again, the prevalence of alternative bids strongly suggests the necessity of treating the entire area as a "locality" within which, in advance of the bidding, it is possible to say that a given contract will be performed.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

MARCH, 1940.

[1] On one lot—#174 on Navy Contract, reg. no. 7272—there was but one bidder and one source of supply. This lot, together with that mentioned in footnote 3, require revision of the sentence on p. 151 of the main brief, that on none of the contracts was bidding confined to an area as restricted as that urged by respondents.

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